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American Fork Irrigation Company et al v. Harold A. Linke et al : Reply Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

AMERICAN FORK IRRIGATION COMPANY, a corporation; PLEASANT GROVE IRRIGATION COMPANY, a corporation; and LEHI IRRIGATION COMPANY, a corporation,

Plaintiffs and Respondents,

— vs. —

HAROLD A. LINKE, as State Engineer of the State of Utah (successor in office of Ed H. Watson, former State Engineer of the State of Utah); KENNECOTT COPPER CORPORATION, a corporation; UTAH POWER AND LIGHT COMPANY, a corporation; SALT LAKE CITY, a municipal corporation; UTAH AND SALT LAKE CANAL COMPANY, a corporation; NORTH JORDAN IRRIGATION COMPANY, a corporation; SOUTH JORDAN CANAL COMPANY, a corporation; and EAST JORDAN IRRIGATION COMPANY, a corporation,

Defendants and Appellants.

Case No. 7626

APPELLANTS' REPLY BRIEF

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ADDITIONAL CASES

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This reply brief is necessary to correct several matters in respondents' brief which could be quite misleading here.

It seems to us that the effort is to escape the fundamental issues involved, by ignoring basic principles, by

raising irrelevant matters, and by some confusion of the issues and evidence.

We will not take the space to recite all instances of these, nor will we pursue them in the order in which they occur in respondents' brief, but we will refer to and comment upon some more important examples, and will do so in connection with one of the three subjects to which they seem to relate.

In this brief, we will cite the record by the use of the letter "R", and the transcript by the use of "T". We will cite our first brief by use of the abbreviation "A. bf.", and respondents' brief by use of "R. bf.". We will use "we" for brevity, as referring to the defendant Canal Companies and the Kennecott Corporation.

The parties hereto, on the Index pages of their two respective briefs, have set up the three points relied upon on both sides. Both relate to the same three general subjects. Since these can be thus easily compared, repitition here is not necessary. If any of appellants' stated points there is correct, they are entitled to a reversal This does not appear to be questioned.

Appellants' first point is a legal one, and respondents have not met this by argument or authority. They did so by restating a somewhat similar proposition, changing ours so as to eliminate vital elements which are present in this case.

The second point is a factual one, and is squarely met by a contradiction of the conclusion derived from the facts.

The third point involved mixed matters of fact and

law, and is met by another statement on the same subject, with some added assumptions.

We will follow these three subjects in the order pursued in the briefs.

POINT I.

The Authorities Support Appellants' Position:

By reference to the Index pages of the two briefs, it will be at once noted that our statement contains the important element that lower rights here are dependent upon the run-off flow and seepage from the direct application to which the waters involved have been applied. Appellants omit this important matter. The proposition that they argue is stated as follows:

> "The respondents may, by a change of the nature of use application, acquire the right to temporarily store water, the direct flow of which has heretofore been appropriated by them, and thereafter release such water for irrigation within the same area, when such change can be made without impairing any vested or existing rights, and will serve to prevent waste and permit a more beneficial use of the water, particularly in view of the fact that the appellants are in no position to complain because *frequently* they do not utilize the rights which they claim might be impaired, and *must release* water which *they impound* into Great Salt Lake."

Of course, it is easier to try to support an ambiguous statement of this kind than to try to meet the relevant point, as stated by us (A. bf. 22). The main difficulty

with this statement by respondents is that it is not a statement of what we have to consider here, and the determination of it is not decisive of this case. It is also impossible to tell whether it is contended that respondents may do what they propose by reason of the last clause alone, or by virtue of any other of the qualifying clauses, or by reason of the purported statement of law contained in the first clause.

As we have pointed out before, this statement, and the statements of respondents generally, proceed on the theory that nobody else is interested in this water, or has any right to be. Yet, the fact that appellants' rights depend upon the run-off flow from the direct application of the high water is the decisive element under the authorities cited (A. bf. 30-37).

If there is one thing on which we must agree, it is that the waters of American Fork Creek flow naturally to Utah Lake. This is recited in respondents' application.

Respondents' right is to use some of this flow, as it passes the area, for direct irrigation only. This is a separate and distinct right from a right to store. The application to change is one to withhold such otherwise passing waters from the high water flows, and release and apply the waters withheld later on the same lands. This is the application here. And, as a change proposition, it can be allowed only if it can and will be administered so as to insure that the now dependent rights will be fully protected.

We have cited (A. bf. 31-37) the cases that have

passed upon such attempts, and, in each one, the right to so withhold has been denied.

If respondents may, as they recite, "acquire the right to temporarily store" by this application, they certainly do not have a *right* to acquire such right. In other words, they do not, as they repeatedly urge throughout their brief, have a "vested right" to a change of nature of use, as sought.

We cited (A. bf. 39) the language used in *Moyle v. Salt Lake City,* that the right to change "is not an absolute or vested right," and involves the "element of judgment" on the part of the State Engineer.

We cited, also, (A. bf. 65) *U. S. v. Caldwell,* wherein this Court said:

> "A complete answer to the contention, however, is that appellants' right to change the place of diversion is not an absolute or vested right, but is only a conditional or qualified one. No such change can be made, if thereby the *public,* or any other appropriator, prior or subsequent, is *adversely affected.*"

As is also pointed out in the *Moyle* case, above, there is a distinction made in the statute (100-3-3) as to this kind of application for "permanent" change. As to applications for "temporary" change, it is recited that the "State Engineer shall make an investigation, and if such *temporary* change does not impair any vested rights of others, he *shall* make an order authorizing the change."

But, as pointed out, there is no such language in

dealing with permanent change, and here we have application for a permanent change. So that, while this proposed change may or will "adversely" affect our rights, respondents do not have a "vested right" to it, even if it may not. The Engineer may, and here does, have problems of administration, independent of those of the litigating protestants.

The statute says:

> "No *permanent* change shall be made *except on the approval* of the application therefor by the State Engineer."

In all of the provisions of our water code, dealing with the Engineer's duties, and his authority, and with the many kinds of applications provided for his approval, this is the only instance in which it is expressly stated that the thing sought cannot be had "except" on "the approval" of the State Engineer.

This is important, and it probably is because this, as well as the problems of distribution which are afterward involved in all such changes, calls for the application of special judgment, training, and experience.

It would seem certain that, when a task is so completely committed to a particular administrative office, his determination could not be properly over-ruled by the courts, on a mere difference of opinion (A. bf. 77, 86), or for anything short of capricious conduct, amounting to an abuse of discretion. There is nothing like this alleged or claimed here.

But more directly on Point I, it is noted that respondents do cite one case supporting their statement, but none refuting ours.

They cite *Seven Lakes Reservoir* (Colo.) (R. bf. 36), as if this were a discovery of theirs, omitting to mention that we had cited it (A. bf. 30) for the purpose of distinguishing it, by pointing out that, in that case, there were no rights dependent upon run-off from the former use of water involved. The opinion recites that no other rights *could be* affected.

The reservoir company had purchased new rights, and took them into the Big Thompson River. This river is one of the large streams tributary to the Platte River. They sought to then turn out and store the water. The opinion restricts the decision to these "priorities" purchased" for such storage (93 P. at 486).

On rehearing, it is further pointed out that, in that case, "there cannot *possibly* be any greater burden imposed upon the common source of supply of the respective ditches owned or controlled by the parties * * *."

Also, it is pointed out (93 P. at 497) that this decision is not contrary to *Colo. M & E. Co. v. Lorimer,* 56 P. 185. This latter case is one of the cases cited by us (A. bf. 31, 43), and it holds that, where lower rights are dependent upon the run-off from the right of use by the prior appropriator, such appropriator cannot withhold and store a portion of the water which he is entitled to use directly. As the opinion says:

> "Otherwise expressed, * * * although the irrigation company could change the use of its ap-

> propriation from irrigation to that of storage, it could not *divert* water for that purpose, which would result in a diversion measured by either volume or time to the damage of plaintiff."

Thus, in one of these two cases it was held that the change could be made, and, in the other, it was held that it could not be made. And the difference is that, in this latter mentioned case, the lower users used the water, and their right of use might be affected as to volume or time by its being stored. That is the situation here, and there is no value in quoting from a case in which that point could not be involved, at all.

We also cited other cases (A. bf. 33) involving storage of direct flow waters, including the *Finley* case (A. bf. 34), which is in point on the withholding of such water, where there are lower dependent rights.

Other cases follow, discussing the principle, including the *Williams* case (Or.) (A. bf. 36), which is again in point on the question of diverting by an upper user, when lower rights depend on the run-off from the former use.

Respondents have conveniently ignored all these cases.

And, incidentally, it is important to mention, at this point, that, throughout respondents' brief, they refer to this proposal of theirs as something that is "common in irrigation practice;" or that occurred in "numerous" or "frequent" instances, and is "similar to that utilized on countless other streams" (R. bf. 8). This is just not so.

In introducing the cases above referred to in our

brief (A. bf. 30), we called attention to an article by an author, Mr. J. E. Ethell, in which he stated that, up to that time (1910), on the question as to whether an "owner of a prior right to water for direct application (is) privileged to store water for future use," he had found only two cases. And this plan is not only extremely rare, but, in this State, was completely new, with this case.

Note, also, that the question that Mr. Ethell is discussing is whether such owner is privileged to withhold from his own right, and store, without reference to the other point as to dependent lower rights. Neither side has found a single case where an application for such change has been made before to a public board or official.

On the point of run-off, which we are now discussing, we made a thorough search, and found only the articles and cases cited. Respondents have cited none additional, except that they do refer (R. bf. 37) to another Colorado case, *Greeley & Loveland Irr. Co. et al. v. Farmers Pawnee Ditch Co.*, 146 P. 247, and to the *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 52 Utah 347, 147 P. 852.

This Utah case is not in point, and there does not seem to be much claim that it is. It does state, however, as quoted, "that a distinction may be drawn between a direct irrigation for immediate use on the one hand and storage for future use on the other." See, also, on that *Rocky Ford v. Kents* (Utah), 141 P. (2) 629, par. 1.

The Colorado case (146 P. 247), however, does decide a point which is directly contrary to the respondents'

position on Point I. Respondents (R. bf. 37) stated that "the same principle is enunciated in this case as is decided in the *Seven Lakes Reservoir* case above referred to." The fact is, that the point decided in that case is not involved in this *Greeley and Loveland* case, but the latter case is pertinent to our case here.

In this case (147 P. 247), the Greeley and Loveland Company operated an irrigation system on the Big Thompson River, 175 miles above the irrigation district of the plaintiff Pawnee Ditch Company. A storm occurred at the upper district, producing a substantial amount of water. The defendant irrigation company had a right to and could beneficially use the water, but their gates were not set for it, and they could make better use of it later in the season by then storing it, which they had the facilities to do, and which they did.

The ditch company brought the suit, to require them to release the water down the stream, and to restrain them from again storing water which they were entitled to use for direct irrigation.

The opinion, which is also by Judge Gabbert of the Colorado Supreme Court, denied the right of the irrigation company to store the water, and ordered judgment in accordance with the prayer. This was against the same contentions that are made here, that they were only taking it at a time when they had a right to use it, and in quantities which they then had a right to use, and to release for use on their same lands, all of which, it seems, was not disputed.

In this Colorado case, there was also the additional

defense contention that the lower ditch company had not proved that, if the water had not been held, it would have been available for use by plaintiffs. This, again, is a contention which is repeatedly made in respondents' brief; that we are required to show such unavailability and damage at all times. This, of course, is entirely erroneous. All that need appear is that the effect of granting this application would be such that it could not be insured that our *rights* would not be "adversely affected."

On this point, Judge Gabbert (146 P. at 249) said:

> "On behalf of the defendant company, it is contended that the complaint fails to state a cause of action, because it is not alleged that, had the flood water not been intercepted by storage, it would have reached the headgate of the plaintiff. It is also claimed the testimony fails to establish that, had this water not been diverted, it would have been available for the use of plaintiff; and hence the judgment is contrary to the law and the evidence. These propositions can be considered together. The water involved did not belong in specie to the plaintiff; but when it appears, as it does, from the allegations of the complaint and proof, that it has a decreed priority to the use of water from the stream, the flow of which would presumably be augmented by the flood water diverted, and at the time of such diversion was in need of water to supply its priorities, it will be presumed that the volume in the stream was depleted to its injury as the result of the *wrongful diversion* by the defendant company. So that, instead of plaintiff being required to allege and prove such facts, it was incumbent upon

> the defendant company to allege and prove them in order to excuse its wrongful act."

Like the *Colo. M. & E. v. Lorimer* case (56 P. 185), and our case here, this then again is storage "which would result in a diversion measured by either volume or time."

Preventing Waste is Not Involved:

In stating their first point, to the effect that respondents may acquire, by change application, the right to store water, a limitation which they impose on the generality of this statement is that they may so acquire "when such change * * * will serve to prevent waste."

Respondents talk a great deal about preventing "waste," but do not seem to tie it into anything that affects the rights of anybody here. And, so far as we can see, there are no rights which depend on this, at all. This reference could be to any of three matters mentioned by them:

1. The first is that this application might have some affect on possible early waste by them.

2. The second is that it has some connection with alleged waste by us.

3. And the third is a reference by them to the laws applicable to waste waters.

1. The first of these can only be by way of some kind of admission that, by turning out early all of the water that they can get into their ditches, they might commit some waste. And this involves, also, the suggestion that, if they hold back some of it, instead of putting

it into their ditches, then this waste would be prevented.

There is, of course, no sense or validity in such suggestion, because they never did acquire the right to waste any water. And, as the Engineer has said in his opinion, they could expect to hold back only when they could beneficially use.

And, it should be pointed out that, while their expert witness, Mr. Richards, has assumed that they had a right to fill their ditches in the early season, when they could (and so has respondents' counsel), the watermaster has denied that they so use water, or that they could so beneficially use it all, except "if it is a dry year" (T. 58).

He also testified, contrary to their assumptions, that "run-off water, could vary according to storms, too." Also, and contrary to what respondents say in their brief (R. bf. 6-7), the witness testified that "when we get the ditches cleaned out, we can take care of quite a lot of water * * * up to about between 300 or 350 second feet * * * I do not think we can take care of any more than that" (T. 43).

We think it is perfectly fair to say that 300 second feet is about the capacity of the ditches of the "three companies" there referred to by this witness. They seem to agree that some of this early use of high water has not been highly beneficial.

It is important to note that, by the decree (R. 113), Lehi is entitled to only one-sixth of the water of American Fork Creek up to July 1st of each year. So that there would have to be 600 cfs. before they would be entitled to 100 cfs. Also, that American Fork is entitled to only

80 cfs., and that then the secondary users take over in that area (T. 71-72; Searle).

He also said (T. 49), "some years you water early and some you don't. It's according to the season."

And, the following occurs (T. 50):

"Q. Well, in April it would be pretty wet from the snow and rain, would it not?

"A. Well, you wouldn't water if it was snowing and raining."

This is the only witness of respondents who testified as to these facts, and his testimony is contrary to what is assumed in their briefs and arguments.

The witness went on to testify (T. 50) that, if the water went through the ditches, and was not used on the land, it would go to the "mill-pond, sloughs, and lake;" and (T. 52) that there would not be as much water go down there in August as there would in April; and that, in a dry month, in a dry year, "there wouldn't be any get down" to the Lake (T. 52).

Respondents cannot get authority to store any water they might otherwise waste.

2. The second reference is to our alleged "waste" of water from the Lake. Not only is respondents' right unaffected by any claim of this kind, but, as we think we have demonstrated (A. bf. 24-27), the claim is utterly untenable. Because, in three years since 1924 (T. 300), water has been released into the Jordan River from Utah Lake, and then not in the season in which respondents propose storing the water (T. 147-149). They ex-

pect to get a permanent right to store every year.

Since we have cited the facts and the record, there is no excuse for the irresponsible and reckless statements made by respondents with relation to this matter. They have not proved that any water that is so turned from the Lake is wasted, at all. They put on Mr. Gardner, the Utah Lake Commissioner, as their witness on this, and he testified that he understood there were rights on the Jordan River, clear down stream into Davis County, and he did not know that any water turned out was wasted (T. 151-154); and no one else testified that any was.

Not only are the facts ignored, but also the holdings in the *Colledge* case, in which case the agreement there approved set up a Lake Commission to control the water, and respondents persist in saying that the appellants turn out and waste the water, when we have no more to do with it than the respondents do.

They also ignore the fact, pointed out in our brief (A. bf. 26), that there is an approved application (No. 12114) by the Federal Bureau of Reclamation to withhold from the Lake 30,000 acre feet at any time that the State Engineer can anticipate that unappropriated water will be spilled from the Lake. It would be only at such time, and only after existing rights are supplied, that respondents could gain any right to withhold such water, even if they had filed an application so to do.

3. The next matter of waste to which they may refer in their statement of Point I is their reference to the law of waste water (R. 35-36). This entirely new thought, however, needs little discussion.

We are here dealing with the right to change an established direct use in one irrigation district and system, when rights to the run-off from the use have been acquired for use in a lower and separate irrigation district and system; and it has absolutely nothing to do with the law of reclaiming waste water, as discussed in the authorities cited, or in the Utah cases mentioned, by respondents (R. bf. 36).

And, this whole discussion by respondents, as we say again, has nothing to do with their acquirement or denial of the privilege of the change actually sought by the application here.

"More" Or "Highest Beneficial Use" is Not Involved:

The next qualification that respondents place upon their general statement of Point I is that they may acquire a right "when such change * * * will * * * permit a more beneficial use of the water."

We do not think that a more or higher beneficial use is determinative of the rights of the parties here, at all. If water is required for any beneficial use, it may be so used. And, except under statutory provisions dealing with water for domestic, as opposed to industrial or some other less necessary use, we have never known of any discrimination between beneficial uses by users, because of more valuable crops, or any other similar reason.

Respondents, on this, show a very clear conviction that use *by them* is the "highest" and also the "most beneficial" use, and that any water that goes past them

and is used in Salt Lake County is either totally "wasted," or is put to a less beneficial use.

They were all steamed up about this before the Trial Court, and still are; and yet, so far as their right is concerned, or, for that matter, the rights of irrigators in Salt Lake County are concerned, it makes no difference whether the water is used late or early on cheap crops, or late or early on valuable ones. This was a subject for good propaganda talk below; but it is of no actual help here.

We point out, also, that there is not a word of evidence in this record, or any proof of any kind, that anyone will or can raise any different crops, if this application is granted.

There is talk in the pleadings to the effect that they can use water later on sugar beets, or "more valuable crops." It is common knowledge, of course, that they raised sugar beets here for many, many years, and supplied the sugar beet factory which stood at Mulliner's Pond near Lehi; also, that that factory has been torn down and removed a number of years ago.

But, there is no proof by any water user, or at all, that they will put the water on any crop different from those on which it has been and is being used, or on which it is now being used in Salt Lake County.

Appellants Injured by the "Effect" of the Proposed Plan:

The last limitation on the general statement of respondents' Point I is that they may acquire the right to store the water involved, "because frequently" we

are not able to utilize our right. This is not true; in fact, we always use all available water (T. 232, line 11).

However, on this, it is argued (R. bf. 33) that we are not in position to object *"to proposed change ** * at least during the time such wastage is being carried on, or when such wastage affects the supply in Utah Lake during any hold-back in the high-water season."*

This remarkable statement is that if, at any time, water is being turned out of Utah Lake, and so wasted, then, and at that time, respondents can hold back such amount of water in this proposed reservoir. Therefore, the application should be approved.

This shows how completely the judgment, obtained in the Lower Court, depends upon the contention and the finding of the Court of alleged waste of water from Utah Lake. This is something that the State Engineer and the other defendants never suspected could be involved in this application, at all, and, certainly, appellants do not think that it is.

(So, parenthetically, and mainly for Point III *ante,* here is another impossible administrative problem for the State Engineer, as he would have to determine, each time that water is being released from the Lake to Jordan River, as to how much of such water is being lawfully used by appropriators between that point and Great Salt Lake. And, if he thus determines that some of this is being wasted, he must go up to respondents' reservoir and hold back an equal amount. It is not indicated why he would not have to hold back for the Bureau of Reclamation at Deer Creek, instead.)

We have discussed the point involved (A. bf. 24), and won't go over it again. And, it is clear that no waste is proved here, even in those three years occurring since 1924, in which some water was released, before the appellant canal companies started irrigation (T. 152-154, 300, 307-308). Also, that any water which may be expected to spill, if not required below, is appropriated, up to 30,000 acre feet, by the Bureau of Reclamation (A. bf. 26).

All that this application seeks is to change respondents' direct use of water back up to a reservoir, before such water reaches the Lake. It has no relation to rights in water that might be released from the Lake (A. bf. 25-26).

It appears, without dispute, that irrigation from the Lake starts the first part of May usually, and practically always somewhere between April 19th and May 10th (T. 156, line 19). Also, that the withholding, which by the application could begin April 15th, ordinarily could not start until about June, when the snow would be melting up on top there. This, then, if withheld, would directly affect the rights of the appellant users, as well as other rights, on the Lake.

And, this above quoted portion of respondents' Point I seems to us to show two additional important misconceptions in this case:

a. The conception that they are dealing with simply one turn of water, or water that might become available for a few days—say every five or ten years, under some special circumstances—when, in fact, in this case we are

dealing with an application for the privilege of constructing a permanent dam with a permanent right to withhold and store out of high water in every year, regardless of the conditions recited.

b. Also, the conception that we are contending that there may not, at some time, be a moment or a day or a week when they could withhold water without injury to what we might be doing at that time. We are objecting to "the effect" of a permanent plan, which cannot be operated without injury to our rights, as the Engineer has found.

The *thing* that we are claiming is our acquired right in the use of the run-off from respondents' direct irrigation use. This run-off supplies our right. It supplies no right of respondents. It is not a question of temporary inconvenience. It is a matter of change of conditions, which change will permanently jeopardize all rights on this source in this County.

The cases, such as the *Gunnison* case, cited by respondents (R. bf. 38), predicate the privilege of change upon the premises that it "does not injuriously affect the *rights* of others."

The language of the statute, 100-3-3, is that "no such change shall be made if it impairs any vested *right*."

This is the plan the State Engineer had to pass upon. He had to determine whether the plan could be set up, and administered, so as to insure that appellants' rights would be fully protected. It cannot be, and will not be. But, to respondents, that makes it not at all "un-

feasible." The more water the plan keeps away from us, the more "practicable and feasible" it is.

This position of respondents (R. bf. 33) also discloses some very important admissions here.

The whole contention that they have the right to withhold and store, when water would otherwise be spilling from the Lake, admits that the water would reach the Lake promptly, if not so withheld. And this is true, as we have shown (A. bf. 40-45). It is so plain, in fact, that it is not surprising that respondents unconsciously concede it.

They make the same admission, when they argue that their plan might save some water loss from evaporation, because the 1,000 acre feet of water, if not held back, would expand the surface area of the Lake by about 35 acres. They claim that this would be about the size of their basin reservoir, as proposed, but contend that it is colder up there, so that the evaporation would be less.

All of the testimony on this, and the argument, relates to the increased surface at the time of the proposed withholding, and, therefore, of course, admits that the water would be in the Lake, except for the withholding.

There is an additional contention, which is related to the foregoing discussion, and which should, therefore, probably be mentioned before we leave Point I. This is the contention mentioned (R. bf. 25), and reiterated elsewhere, to the effect that, if anybody were injured by the water not going into the Lake, as it now does, this would be "inferior" or "secondary" rights, and not the rights of these protestants and defendants. We have cited the

Lake Commissioner's testimony that the water never supplies all the Lake rights and, above, that we need all the water we can get into the Lake.

And we cannot find in the record any proof of any rights that are inferior to the rights of these defendant parties, although we do mention in our brief the Bureau of Reclamation's approved application for the privilege of holding back waters from the Lake.

It is sufficient to say that the defendant canal companies' rights are, in fact, secondary to the "primary rights" on Utah Lake, and are not the "primary rights," as respondents seem to assume. The Morse Decree (Ex. "13") shows this, and it also requires the five Associated Canal Companies to see to it, by pumping water or otherwise, that the actual primary rights in the Lake are supplied. This is a condition imposed upon our right to withdraw water from the Lake. It also recites these primary rights, and shows that many of these are down the river, northerly from any diversions by these canal companies. We pump water every year to supply them.

Of course, the Kennecott rights are rights that were acquired on applications filed subsequent to this Decree; and, as shown by their chief engineer (T. 368-369), their rights are seldom supplied, and it is vital to their rights that this water get into the Lake during the early season. And, it is also plain that, whatever portion may get into it in the Fall, would generally be of no benefit at all.

POINT II.

The respondents say, as to this point: "The record discloses that the proposed plan for diversion and storage would not interfere with the rights of the lower users, either as to volume, time of use, or otherwise."

Leaving the question of volume for a moment, it seems remarkable that anyone would say that you could hold back, for two to six months, high water which, in natural course of drainage and use must promptly go to the Lake, when the ground is saturated from early melting of snows and from rains, and that this would not interfere with the appellant users below, as to time.

It is undisputed that we have to start pumping from the Lake in May, or before, in each year, to get water for irrigation; and we start irrigating in Salt Lake County between April 19 and May 10 each year.

And this is claimed, even though the water may be released from this proposed reservoir as late as October; and, in any event, in the later irrigation season; and will, by the very purpose of the undertaking, be released in the later, hotter, and drier months. The time that it could reach the Lake would, necessarily, be later, and its further delay, by greater re-uses, clear down through the swamp areas to the Lake, must, also, result in greater loss by evaporation and transpiration.

We believe we have sufficiently established this, and have also demonstrated that it is a matter of common knowledge that, not only must such delay in time occur, but a very substantial loss would occur (See A. bf. 38-

45). The opinion in the *Pawnee Ditch Co.* case, supra, says: "it will be presumed."

Respondents do not cite any record to support their statement. They claim that their expert witness stated the conclusions that the plan could be operated so that lower users would "not be substantially damaged." The State Engineer, who is charged with adopting administrative policies which will prevent interference, says that it cannot be done.

Respondents talk about findings of fact by the Court, as to such interference. The Court makes no finding of *fact* on this, and no findings of *fact* on any controverted issue here, at all. The Court states only conclusions to the effect that the "approval of the application would not infringe on vested rights," and states, as a reason, that water spills to Great Salt Lake in some years (R. 116).

In *Sigurd City v. State, et al,* 152 P. (2) 154, at 156, this Court says something that is exactly applicable here:

> "But the court in its findings of fact as well as in its conclusions of law and decree concluded * * * that the defendants were the owners of all of the waters taken by plaintiff into its pipelines at Rosses Creek. Such conclusions, even though stated as findings of fact, are really conclusions of law, and to the extent that they are in conflict with the views herein expressed are not supported by the facts and are therefore set aside."

We call attention now to a few matters stated by

respondents in connection with this point, in which they appear to be entirely mistaken.

Respondents' witness, Mr. Richards, testified only that the taking of this water into the proposed reservoir would not affect availability of water in Utah Lake "to any substantial degree," and indicated that he based this mainly on the fact that this particular proposal is to hold back 1,000 acre feet, which he thought, all told, was not a "substantial" amount. That, however, is wholly immaterial in this case. It is rights, not quantities, that are controlling here. And, as we have demonstrated (A. bf. 40-41), if these respondents can so hold back that amount, they can hold back any other amount, or the total flow of American Fork Creek; and so can any other upper user, on any other tributary to the Lake, or to any supply in the State.

Respondents' witness also proceeded upon the theory that water, reaching the Lake in October, would be "as available" as water reaching it in the earlier irrigation season. This is totally wrong, as to time and as to quantity, too, as to anyone except the "primary" users on the Lake. And, the undisputed fact is that, because the Lake is always drained down to the bottom, water reaching the outer borders of the Lake late would not reach the body of water from where it could be pumped; at least, a great deal of it never could.

Respondents next attack (R. bf. 41) our witness, Mr. Earl, and also Mr. Gardner, notwithstanding the fact that Mr. Gardner is a Commissioner on the Lake, appointed by the State Engineer, and that respondents

called him first as their own witness (T. 146). The fact is that the testimony of both of these witnesses is entirely intelligent, consistent, and correct. The trouble is that respondents either do not understand it, or they want to misconstrue it.

This is done largely by taking the testimony of these Engineers, with relation to percolating underground waters, and discussing it as if they were testifying as to surface run-off, and thus claiming a contradiction. There are no contradictions.

As to the waters that enter to depth, it is true that no witness did, and nobody can, tell exactly when this would reach the Lake, or whether a good deal of it would or would not reach the Lake at all, or how much the loss would be.

Mr. Earl's testimony is that of an expert Engineer, who carries great responsibility and has had a great deal of experience in water matters, and who has carried on experiments on the most effective methods of irrigation (T. 332-333). His testimony is not only consistent, but very intelligent and fair, when examined and understood.

It is not shown, as stated (R. bf. 43), that the heavy run-off in the Spring would not reach the Lake until the close of the irrigation season. Not only is it not shown, but the contrary has been shown, and this is admitted, as we have shown above, by the respondents' own contentions. It is only about seven miles (T. 318), and downhill (See Ex. "15"), from the mouth of the Canyon to the Lake.

In this connection, they discuss our reference to a

number of applications filed in the State Engineer's Office since this one was filed, including additional ones on supplies to Utah Lake, and to our contention that we are trying to settle a principle and policy applicable to this kind of change application for the first time in this State. And, on this, they again argue (R. bf. 43) that, if this change were multiplied indefinitely, the amount of usable water would not be substantially affected, because "loss of evaporation might be reduced and waste into Great Salt Lake might be minimized."

This is not correct, in fact. But thus, we are back again to their admission that this water, if not held back, would reach the Lake, and thus cause spilling to the Jordan River, or more evaporation by expanding the surface area of the Lake.

Commencing at page 8 of our first brief, we set up the U.S.G.S. measurements taken 4.10 miles up the Creek from respondents' diversion point. And then, taking all of the readings available down at their point of diversion, attempt to arrive at a reasonable high water flow down there for the 22 years in which the Government took these upper measurements (Ex. "4").

The respondents (R. bf. 10) make some very inaccurate and unfair statements with reference to this comparison. In the first place, nobody can rightly question the measurements by the U.S.G.S. (Ex. "4"), nor can they question, as respondents do, the measurements made by the State Engineer's Office (Ex. "7") from 1938 to 1940 (A. bf. 10).

By taking all the readings available at the point

of diversion, including the State Engineer's readings, and what we have referred to as the Gardner reading (A. bf. 10), but which is also the same reading for 1938 taken by Mr. Warnock, one of respondents' watermasters (Ex. "CC"), and also taking Mr. Searle's readings for the years 1944 to 1948 (Ex. "L"), we had nine readings in nine years, as indicated in our brief, for comparison with the U.S.G.S. readings (Ex. "4") for nine out of the twenty-two years, on the same dates.

This showed that 45% added to the U.S.G.S. high water readings, equalled the readings at the point of diversion in the month of May on an average. This is the month in which it is plain that the high water maximums mostly occur. This seemed to us to be a fair and, perhaps, the only appropriate comparison that could be made in order to determine the approximate high water flow at the point of diversion for the 13 years in which we had no readings at the point of diversion. Respondents do not like it, because it proves that 1938 was not an exceptionally high water year, as they have assumed and have told the Court below and here.

Now they state (R. bf. 7) that the majority of the readings on our page 8, which are the U.S.G.S. readings, are below 300 cfs. Since we were only trying to determine how frequently 300 cfs., or more, is delivered at the point of diversion, this is a misleading statement. The 300 cfs. by U.S.G.S. would show, at least, more than 400 cfs. at respondents' diversion point.

We might add, however, that notwithstanding the substantial make that occurs in May in the River, be-

tween the U.S.G.S. point of measurement and the point of diversion, there are a considerable number of years in which the U.S.G.S. reading is 300 cfs., or more, even up where these were taken; in fact, in nine out of the twenty-two years.

Respondents then complain (R. bf. 10-11) that the U.S.G.S. measurements are at variance with some of Mr. Searle's readings. If they are, it is too bad for Mr. Searle. However, his readings have been introduced and, on the whole, they do not vary a great deal from the pattern set by all the other readings. And our formula is not "wholly at variance with them" (R. bf. 10). It is based on them, as well as the other readings.

Counsel then say that they "could" pick out, and they do pick out, an instance where there was more water on the same day shown in the U.S.G.S. readings upstream, than is shown by Mr. Searle at the point of diversion. Since it was testified that there were no diversions of any consequence between these two points (T. 54), this would appear to be impossible, if taken on the same exact flow; and so respondents want this Court to believe that the U.S.G.S. readings, taken by their Engineers who had no interest whatsoever in anyone connected with this suit, and of which we have exact photostats (Ex. "4"), are wrong; and this, even though they are entirely consistent with all other readings, except a few of Mr. Searle's.

As a matter of fact, his readings, which respondents finally contend are the only correct ones, are the only

ones shown to contain inaccuracies, upon their introduction (T. 38).

Respondents, for an example, erroneously say (R. bf. 10) that on May 13, 1944, the U.S.G.S. readings were 301 cfs., and Mr. Searle's readings were 225 cfs. That would not be too surprising for one day, if true, since respondents themselves prove, from two witnesses (T. 284), that readings at the same point could vary a good deal during the same day. This is due mainly to the fact that it may be very cold in the morning and warm in the afternoon up there.

But, the fact is that the U.S.G.S. reading (A. bf. 8 and Ex. "4"), on May 13, 1944, is not 301 cfs., but is 275 cfs.; and the fact is, also, that Mr. Searle shows two readings (Ex. "L") on May 13, 1944, the first one marked "A.M." being 224 cfs., as stated by respondents, but the "P.M." reading on that same date was 352 cfs. (Ex. "L", p. 1).

And so, we have for comparison on the "13th" a reading of 275 cfs. by the U.S.G.S. and a reading of 352 cfs. by Mr. Searle, which is a different and a consistent picture.

There may be slight variations, but, taken over the whole of the nine years, the result seems fairly accurate. And, as testified by the Lake Commissioner, the pattern is consistent (T. 191).

Respondents say that in every case in which a similar test is made "a similar . . . divergence will be found". But, of course, their claimed "divergence" is wrong, because they use the wrong figures, and this statement

is incorrect, also. But, it is true that there are a few other days when Mr. Searle's figures, at the point of diversion, are lower than the U.S.G.S. readings on the same date. His may be morning readings. He does not indicate as to this, except occasionally.

There are no instances that we could find, in checking all of the May readings, where the Warnock readings or the Gardner readings, or the State Engineer's readings, at the point of diversion, are lower than the U.S.G.S. readings on the same day. It could be possible, however, that, if Mr. Searle took an early morning reading, and U.S.G.S. took one late in the afternoon, that Mr. Searle's reading could be less, and both could be correct.

We are satisfied that the comparisons that we made (A. bf. 8-12) are reasonably fair and accurate. It is not surprising that respondents are disturbed because these figures show that, in the great majority of the twenty-two years in which the Government took its readings, the high water at their diversion point reached a volume which, in the Spring, would thoroughly saturate the area. And so that, if water were then held back, it would be water which would promptly reach the Lake, if not so held.

Nor can respondents brush aside the showing that we have made that, from some inflow readings taken in this area, the run-off in the high water year of 1938, as compared with 1939 and 1940, which were low water years, was very substantially greater in May and in June (A. bf. 15), and that, in May of 1938, through

American Fork Creek and Spring Creek alone, it was more than six times as much as in 1939, and almost four times as much as in 1940 (A. bf. 16, and Ex. "11").

As we have stated before, the exhibits and respondents' witness, Mr. Richards, testimony shows that 65% of the whole flow of American Fork Creek goes down in the months of May and June; most of this in May.

Before leaving Point II, we would like to emphasize a closely related conclusion to which this case has narrowed here, and which seems to us to be very important.

The Trial Court emphatically, and without any finding to guide the State Engineer, reversed him; and a complete examination of the briefs and of the records and findings here will clearly indicate, we think, that it was upon the conclusion that this plan could be put into effect and operated, and the rights of the appellants protected, because of two stated reasons, and only two reasons, and on two theories only, to-wit:

(1) That the granting of this application "would not injure or disturb vested rights" (R. 99, 114), because of finding No. 25 (R. 116) "that for several years in the immediate past during the period April 15 to June 15, there have been spilled from Utah Lake * * * large quantities of water * * *".

The fact is that these spillings were earlier than this (T. 146-149). And, in any event, this finding is wholly untenable as a support for this reversal on this "permanent" change application, or

(2) In ordering this reversal, the Trial Court is

necessarily setting up its judgment squarely against the judgment of the State Engineer on the practical proposition committed by the Legislature to his discretion that this undertaking cannot be administered so as to insure that vested rights will not be injured.

This Court has held that this cannot legally be done (A. bf. 69, 77), and the Idaho Supreme Court has so indicated (A. bf. 85-86); and it was on this proposition that Judge Cardoza said:

> "Courts do not sit in judgment upon questions of legislative policy or administrative discretion." (A. bf. 86)

POINT III.

This point, as will appear from the crux of the the issues here, ~~and is of the greatest importance to the decision below,~~ as summed up in the last preceding paragraphs, is one of great importance ~~in determining~~ TO THE State Engineer, as affecting the water policy of the State, and the burdens and duties of his office.

We direct the Court's attention to our stated Point III, as it appears on the index page of appellants' brief here, and as it is restated (A. bf. 45) and supported logically and at length (A. bf. 45-86).

It will be noticed that respondents (R. bf. 49-59) have ignored the law involved in our statement and the authorities cited in our brief in support of it. They make a statement of their Point III which deals with disputes of fact. (See index page and R. bf. 49).

In the first portion, they simply state that the "State

Engineer's assertion * * * that it cannot be so administered as to avoid such injury is not supported by the evidence."

And argue that this is so because the State Engineer did not testify, and then make the amazing and incorrect assertion that the position of the Engineer "has been abandoned" by him.

The only other refutation that is attempted is a reliance upon the assertion that the State Engineer's position has been entirely "overcome by the findings and judgment of the trial court * * * on the trial *de novo.*"

Not a single authority is cited in refutation of our position as supported by the constitutional and statutory provisions and numerous authorities cited; nor is any authority cited by them in support of any phase of their Point III statement.

We will notice, briefly, the principal contentions of respondents on this.

The statement that the State Engineer's decision was that the proposed plan *"can not be so administered as to insure that the rights of lower users will not be injuriously affected,"* is a correct statement. And this statement is quite conclusive against respondents. Their statement that it is not supported by the evidence, is not correct, and the implication that we have the burden of supporting it is wholly untenable.

Since the Legislature has charged the State Engineer with the duty of determining policies and practices of administration as to this kind of change, there seems no escape from the proposition that the burden is on

respondents to prove that his judgment is not only not supported, but is so arbitrary or capricious as to amount to an abuse of the discretion expressly vested in him. His judgment certainly carries every presumption of correctness and validity.

And so, while it seems that there is no requirement that appellants support the Engineer's decision, the evidence by the witnesses, and the entire picture, including the measurements, the surface contours, the water conditions at different seasons, and the natural inferences from all these, support this decision.

But appellants, in this statement and in their brief, appear to make the claim that the decision is not supported by the evidence because the Engineer did not testify. It is true that he did not testify on this matter in the Court below, and neither did his Chief Deputy, who was present there. However, when we offered the decision of the State Engineer, which had already been pleaded by the respondents, we, as is usual in the practice, indicated that the Deputy, who prepared the decision, was present for cross-examination, if respondents desired to question him as to the statements contained in the opinion (T. 324). And these statements of the State Engineer of his reasons, given in support of his decision, were specifically offered and received as Ex. "12" (T. 324). This is a clear statement of essential facts, of the pertinent principals of irrigation law included, and the conclusion resulting from these.

State Engineer's Testimony:

The respondents' statement that Mr. Fred W. Cott-

rell, whose initials appear on the State Engineer's decision (Ex. "12"), participated in preparing the decision is correct, as we all know. And we all know that he attended all hearings before the State Engineer, together with Mr. Ed W. Clyde, who was then attorney for the State Engineer, and that Mr. Clyde examined witnesses, and they both engaged in the discussions, and later participated in preparing the Engineer's decisions.

And it was this Mr. Clyde who had then collected and annotated all the Utah water cases in the two volumes completed in December 1, 1948, as the *"Digest of Utah Water Law."* This work was done in connection with Mr. Clyde's work in the State Engineer's Office.

Mr. Cottrell, a civil and hydraulic engineer, had been Chief Deputy in the State Engineer's Office for fifteen years (T. 170), and he and Mr. Clyde were and are two of the best qualified authorities on water law and administration in the State. We need make no further comment on respondents' repeated attempts to ridicule this opinion. It is an intelligent and clear statement, and every principle of law in it is sound and correct, and no authority has been offered to prove otherwise.

The statements made by respondents almost at the beginning and throughout their brief, to the effect that the State Engineer introduced no testimony as to the impracticability (R. bf. 2), and that his determination "that the application can not be so administered as to avoid such injury . . . has been abandoned" (R. bf. 24) by him, are entirely incorrect, as respondents must know.

They apparently admit (R. bf. 59) that the State

Engineer's decision was before the Trial Court, and in evidence. They seem to minimize the force and effect of this by saying that this was "the very decision which it was the court's duty to make anew." However that may be, the decision is the statement of the Engineer's position, and is his statement of a number of conditions and reasons for his decision. It is in evidence.

It seems foolish to suggest that we should have had him repeat what is in this document, or re-state it. Nothing in it has been refuted. It cannot be destroyed by some layman's contrary opinion, when the statute makes the State Engineer's judgment controlling.

The State Engineer has not abandond his position. On the contrary, he was represented at every stage of the trial by his attorney and Chief Deputy. His attorney signed the main brief that was filed by appellants, and they have again participated in this brief. His answer to respondents' complaint denies every material allegation.

The question for decision is of vital importance to the State Engineer, both as a matter of expense and of water administration policy, and the functions of his office. Since the litigation and decision here, as this Court can take notice, the State Engineer's Office has received numerous similar applications which involve the same questions, as to withholding out of direct flow rights, where lower users' rights depend upon such direct irrigation, and where the applications are to withhold out of waters which the applicants have a right to then use for direct irrigation, and to then turn down later in

the season for use on the same land. Several of these applications have been denied, and other decisions are pending. An additional 23 cases, involving the same principal, are now on appeal from the decision of the State Engineer.

Another of the greater mistakes in respondents' brief is in the statements that the Trial Court has made findings of fact as to the practicability of the operation proposed. There is no such finding of fact. There is merely a bland conclusion, which is wholly unsupported by any findings, at all, or any suggestions as to any method that the Engineer might pursue to overcome the difficulties suggested by him, or recited by us (A. bf. 52-56), or at all. We have only a conflict of opinion between the Court and the administrative officer charged with the exercise of discretion as a matter of legislative policy.

Respondents attempt to escape this situation by the assertion that the statute provides for a trial *de novo* and, therefore, intended that the Court should so substitute his judgment. They say that "we all understand" the effect of a trial *de novo* on appeal from the City Court (R. bf. 59), but they then absolutely ignore all of the decisions and the authorities cited by us on the subject of this kind of appeal, including the decisions of this Court, and which made a clear distinction between that kind of court appeal and appeals from an administrative officer or board, charged with the exercise of judgment and discretion. These point out that the decision of such officers are to be treated as still in exist-

ence, regardless of the appeal and trial *de novo,* and then can be set aside only on legal grounds, or, in cases of this character, for abuse of discretion. (See A. bf. 61-74, 78-86). This Court has made it clear that the opinion of the Court cannot be substituted for that of such administrative officer.

And, in answering a similar suggestion, as we have pointed out before (A. bf. 70), with reference to this statute on trial *de novo,* this Court (77 P. 2d, at 365) said:

> "But Section 100-3-8, *supra,* does not stand alone."

The Court then cites other sections of the water statute, dealing with the State Engineer's powers and duties, and gives effect to these.

All we are asking is that the other sections, involving the administrative duties and discretion of the Engineer, be considered by the Court in the same manner here. It is these sections which proclaim the State policy, which the Engineer has followed.

Nor is there any material evidence that the plan, which the Engineer found could not be administered so as to avoid injury, can be so administered. Respondents' one witness set up (T. 387-391), in connection with his Ex. "EE", what he referred to as an "illustrative plan" for a different and theoretical operation. He said, as to this function of administration and his testimony, that "it can not be determined unless you make certain assumptions" (T. 387, line 12).

We have pointed out that his assumptions, both as to time of storage and as to time of release, and other matters, in this theoretical illustration are not in accordance with the application which the Engineer would have to administer. To avoid releasing and storing in the same period, as the application provides, he assumes to store in April, when there can be no storage, for the simple reason that the snow will not be melted, or melting will barely be commencing in the storage basin. Then he assumes release of all the water in July, and the application contemplates, or requires, no such release. Then he assumes use of it on a limited amount of acreage, so as to try to give some run-off, when the application provides for its use on all the 16,000 acres of land on which the water has been previously used, and the evidence was without conflict that a good deal of it is used on lands not owned or controlled by these respondents. Of course, the water would have to go to those having the right to it when it was withheld.

It is one thing to administer a simplified theory, when you have no responsibility for the outcome. It is another thing to try to administer what is actually proposed here, with full responsibility.

We, and the Engineer, have pointed out many causes and complications that could not be escaped, and which show why this plan cannot be administered, and respondents, as stated in the first part of this brief, have suggested others. But nowhere is there any suggestion for meeting any of these.

Respondents' answer to all of this is simply the

opinion of their own paid expert that it is "feasible," and a denial of one of our statements which was to the effect that they could not even measure the inflow to their proposed reservoir to know how much was being held back, if they were there in the period proposed for storage. On a leading question, counsel obtained an answer from his witness that: "There shouldn't be any practical difficulty" (Tr. 391) in measuring this inflow.

This statement that the water that comes into this basin can be measured so as to know how much they are holding back at any time between April 15 and June 15, is an utterly ridiculous statement. This proposed reservoir, by all the evidence here, is in the nature of a lake, or basin. It is described, in the application (Ex. "B") as Silver Lake Collecting Basin. This also recites, under "Explanatory," that this lake is already being used as a sort of reservoir. It is also referred to as Silver Lake Flat (T. 183) by one who has seen it, and by others, as embracing 35 acres. (See T. 2, 3 and pictures).

The Engineer who testified that you could measure the water that got into it had not seen it. Two witnesses testified that they saw the flow of a stream below it (T. 402). No witness tetified that he had ever seen any of the inflows to it. One witness did indicate, and everybody knows, that it would be normally filled with snow until the last snow disappeared at that high elevation, and that the last substantial flow of water is from these higher snows, and comes in late June or probably July (A. bf. 9).

In order, apparently, to reduce somewhat this difficulty, as well as other difficulties of administration, respondents (R. bf. 6) deny our statement that the elevation of this proposed reservoir is 9,000 to 9,500 feet. Yet, that is exactly the language used by respondents' counsel, in stating the stipulation to which we all agreed. He said (T. 215-216):

> "MR. CHRISTENSEN: We'll stipulate that, subject to if we get definite information to the contrary * * * that the elevation of the proposed reservoir is in the neighborhood of 9,000 feet * * * or 9,500 in that vicinity."
>
> "MR. MULLINER: 9,000 to 9,500."
>
> "MR. CHRISTENSEN: Yes."

There was never any definite information to the contrary, and this stipulation is as to the "proposed reservoir" itself.

As to this plan being "feasible," it perhaps is from the standpoint of the respondents, because they would doubtless get more water. Their witness is plainly not talking about its being practicable or feasible from our standpoint; and, still, he does admit that there are several difficulties.

Respondents Admit That Plan is "Impossible of Application":

It is very important to note that the respondents, throughout the trial and throughout their brief here, have actually refused to recognize that in the proposed withholding for storage, the administrator could, in any event, legally withhold only such water as they, at that

exact time, would be entitled to use for direct irrigation. They assert that this is the theory of their application, which it is; but they refuse to recognize the "effect" of attempting it, because this, at once, sets up one impossibility of administration.

They object to the State Engineer's statement that it would require him to do what they assert their application intends to be done. They quote (R. bf. 26), "as the very basis of the decision of the State Engineer" a part of his opinion, wherein he states:

> "A direct flow user can only use that portion to which his right entitles him, subject to the vagaries of weather, conditions of crop, etc. * * * the approval of the application granting the right to store the water represented by flow rights would impose upon an administrator the obligation of determining, as mentioned hereinbefore, when weather conditions on the ground would or would not permit the use of water by diversion in applying it to beneficial use and time when the applicant would not or could not, by reason of other conditions, use the water in whole or in part by direct diversion. This determination from day to day and from time to time would impose a practical impossibility upon an administrator * * *."

It seems amazing that anyone would ridicule or challenge that accurate statement. It is perfectly basic in the law of change of use in irrigation law. But, respondents go on to state that this "entire thesis" is challenged as being "wholly unrealistic, impractical, and

impossible of application" (R. bf. 26), because it "would entangle an administrator in a hopeless web of confusion."

This is what we have been saying all the time. And the plan does require just exactly what the Engineer says it does. And, unconsciously, respondents have thus come close enough to what is really involved, to recognize the difficulty involved.

The determination that respondents must have the immediate and present right to the use of water, before the same could be withheld, is certainly required on this proposed application, no matter how "impractical and impossible of application" this makes the plan.

Respondents would not dare say that they could withhold water which they were not, at the time of withholding, entitled to use, and then attempt to sustain their application.

They go on to say (R. bf. 27) that water rights are not administered that way. That the Engineer does not watch all water users in the use of their water, and make them quit using it when there is a rain-storm, or a snow-storm, or something of that kind. And that, if the Engineer applied such reasoning to other storage systems, such as Deer Creek, it would prevent the use of that, and other such reservoirs. This misses the point. The Engineer is not applying this reasoning to any such situations.

And, if respondents would open their minds, they would know that this problem of administration is not

involved in Deer Creek, or other similar storage. Their problem here is new and different.

As this high water now goes down, it does not matter much to the appellants' rights whether respondents put some of it out on their ground by direct irrigation during a storm, or whether they do not then turn it out. In either event, most of it would reach the Lake promptly. That is not the administrative matter involved here, now.

The Engineer has not been called upon to tell them just when they can or cannot have this water for direct irrigation, and may never be. But, when they propose to him that he take and store water for their later use, they impose upon him the determination that any such water taken is water they would then be legally entitled to use. This is what he correctly said; and also what respondents say renders the plan "impossible."

Now, in Deer Creek, the water which is stored there is made up of outside water rights, acquired on Weber River high water, and water later from the Duchesne River, and a filing on Utah Lake. This is brought into or held back on the Provo River, and stored. If these respondents had acquired a right from Weber, or Duchesne, and wanted to store it up American Fork Canyon, we would have nothing to say. It would then be a case, such as they have cited from Colorado (R. bf. 36), and which we have reviewed, *supra,* in which new water rights were brought into the Big Thompson River, in Colorado.

But here, they say: We want to withhold only

water which we are entitled to use at the time of the withholding, but we don't want the Engineer to so determine and to so limit us.

And, the Engineer says: If I do not withhold only such water as you are then entitled to use, you are enlarging your right by a change application, which the law does not permit. If you do intend that I hold back only such water as you are then entitled to use, I must make this determination continuously, and so we encounter the problem as recited in my opinion.

And this, with the other things involved, creates a situation that is impossible of administration. Clearly it is not a situation similar to Deer Creek.

And respondents' statements that "there are no difficulties here which were not encountered in any program of storage" (R. bf. 44), and that the difficulties are "less than on numerous other irrigation systems" (R. bf. 51), and that this is a "simple matter" and "one of ordinary water administration" (R. bf. 44), are unsupported and incorrect statements.

Respondents seem to be unable to appreciate the position of the State Engineer, or of any of the users on this supply, except themselves.

Another serious misconception which is repeated in connection with this Point III also, is contained in the statements to the effect that we may not be the only ones injured, or the first ones injured, or that others, whom we are saying may be injured, did not protest, and are not here complaining.

We have adverted to this before, but we wish to

point out that this has nothing to do with the Engineer's difficulties of administration. He has to administer this scheme, or plan, in connection with the rights of everybody else who may be interested in this water, or any of it, either before it reaches the Lake, or at any time thereafter. This should be plain without further comment.

No Statutory Requirement that Application be Granted:

As we have attempted to point out in our main brief (A. bf. 66), Respondents appear to contend that the Engineer has no discretion except to grant their application with the condition attached that it shall be "subject to prior rights." Respondents now somewhat confirm that position, but they approach it from a little different angle. They quote (R. bf. 55) 100-3-8 that "It shall be the duty of the State Engineer upon payment of the approval fee, to approve an application if," etc., and the statute goes on to say "if" there is unappropriated water, or the proposed use will not impair existing rights, or interfere with more beneficial use, etc.

Then they follow with the statement that "It will be seen that if certain facts exist, it is the duty of the State Engineer to approve the application." This contention of Respondents is exactly contrary to the analysis of the statutes by Justice Wolfe in the Moyle case. (See 176 P. 2d at 889). It is pointed out there that this statement would be correct as to applications for temporary change, but not as to a permanent change, and, "If certain facts exist," it is the duty of the State Engineer to grant a temporary change. But, as the opinion points

out, as to applications for a permanent change, both the "privilege" of the applicant and the duty of the Engineer depend upon "the element of judgment of the State Engineer."

The analysis in this opinion is clearly sound and the position of Respondents as to this kind of an application is unsound. It is true that 100-3-8, while applying more directly to applications to appropriate, has been made to apply to some features of the application for a change in nature of use. This is done by the use of this language in 100-3-3 itself:

> "No *permanent* change shall be made except on the approval of the application therefor by the State Engineer * * *
>
> "The procedure in the State Engineer's Office and the rights and duties of the applicant with respect to applications for permanent changes * * * shall be the same as provided in this Title for applications to appropriate water."

Thus the Legislature sought to save time by adopting the other section dealing with appropriations. But the above-quoted language makes this section applicable only as to the three things mentioned: (1) *Procedure;* (2) *Duties* of the applicant with respect to applications; and (3) "The *rights* * * * of the applicant with respect to applications for permanent changes."

These do not appear to in any way limit the language first above disclosed as to the judgment and discretion of the State Engineer. The first two, as to procedure and as to the duty to make the application in

the manner or form provided, clearly do not have any such effect.

Nor does the third one as to the rights of the applicant, because as this court has at least three times decided, the applicant has no "right" to have this application granted. All that he may get is a privilege. (See 170 P. 2d at 895, Column 1).

And our contentions are not, as asserted by Respondents, contrary to our statutes, but appear to be in entire harmony therewith, as well as with the decisions of this court and the law generally, as to the control by the Courts of Legislative policy or executive discretion.

CONCLUSION

We have attempted to cover only some of the principal contentions of respondents, which, it appeared, might affect questions material to the decision here.

We believe this and our former brief fully sustain the three points relied upon, and as recited in the title page of our first brief.

In other words, the authorities support the position that, where lower users have rights dependent upon run-off from direct irrigation, the withholding for later use is not permissible.

Also, as we have stated in the conclusion to our first brief, the natural conditions here and the properties and actions of water, when taken in connection with the record, establish that the "effect" of this application

would be a diversion affecting lower users, both as to time and volume.

And, in any event, it is certain that on a matter of this kind, which is, by statute, made discretionary with the State Engineer, the Trial Court may not substitute its administrative judgment for that of the State Engineer, and, particularly, that it may not do so without furnishing any facts or suggested method as a guide to that official.

It seems obvious that it must have been due to this error on the part of the District Court, or to the more glaring error that the release of water from Utah Lake into the Jordan River in three years since 1924, caused the reversal here.

We respectfully submit that the reversal by the Court was not justified, and should be set aside.

Respectfully submitted,

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